

SEP 1 1944

CHARLES ELMORE TRAFFERY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 265

CLARENCE W. BLAIR,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES J. MARGIOTTI,

VINCENT M. CASEY,

MARGIOTTI, PUGLIESE & CASEY,

Attorneys for Respondent.

720 Grant Building,
Pittsburgh, Pa.,

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**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The Baltimore and Ohio Railroad Company, Respondent, respectfully presents the following Brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania:

Clarence W. Blair, Plaintiff and Petitioner, seeks to have the judgment of the Supreme Court of Pennsylvania reviewed by your Honorable Court. There is no question but that the Supreme Court of the United States has the power to review such judgment provided the petitioner brings himself within the provisions of the applicable Act of Congress and the decisions of the Court. However, as has been said by Mr. Justice Pitney in *Hamilton Brown Shoe Company vs. Wolf Brothers and Company*, 240 U. S. 251, 60 L. E. E. 629, 36 Supreme Court 269-271: "This is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision."

We call attention to Supreme Court Rule 35, paragraph 5, as found in 28 U. S. C. A. at p. 424 as follows:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

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(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

We submit that neither of the conditions mentioned in subdivision (a) above quoted exist in the present case.

There is nothing unusual about this case which should commend it to the highest court in our country. It is an action instituted under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. sec. 51) by an employee against the railroad employer to recover damages for personal injuries sustained by him in the course of his employment. The burden of proving negligence on the part of the railroad, and that such negligence was the proximate cause of his injuries, rested upon the plaintiff. This case was tried in the Court of Common Pleas of Allegheny County, Pennsylvania, and the jury rendered a verdict in his favor in the amount of Twelve thousand (\$12,000.00) Dollars. Thereafter, the court having refused defendant's point for binding instructions in its favor, defendant asked for judgment notwithstanding the verdict under the provisions of the Pennsylvania Act of April 22, 1905, P. L. 286, sec. 1; 12 Purdon's Statutes sec. 681. The court refused to grant judgment n. o. v. because as stated in the Opinion, "there might have been some negligence in the manner in which the pipe was handled by the fellow employees of the plaintiff", but because of an error in the Charge, a new trial was granted. From the order refusing judgment n. o. v. the defendant appealed to the Supreme Court of Pennsylvania, and from the order granting a new trial the plaintiff appealed likewise. The two appeals were argued at length before the Pennsylvania Supreme Court, and finally that Court set aside both orders and entered judgment for the defendant n. o. v.

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There are two grounds only urged by the petitioner as reasons for granting the writ. The first of these grounds is that the petitioner's constitutional guarantee of trial by jury has been violated. He bases this contention upon the 7th Amendment to the Constitution of the United States, which provides *inter alia* that, "in suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law". If the contention of the petitioner is correct, then no judgment notwithstanding the verdict could be entered in any action at common law. It is a well known fact that judgments of this nature have been entered by the courts both State and Federal in many actions instituted under the Federal Employers' Liability Act, which is a common law action.

In the early case of *The Justices, etc. vs. United States ex rel. Murray*, 76 U. S. 658, 9 Wall. 274-282, it is decided that:

" * * * the 7th Amendment could not be invoked in a State Court to prohibit it from re-examining, on a writ of error facts that had been tried by a jury in the court below".

This case is cited in the later case of *Chicago B. & Q. R. Co. vs. City of Chicago*, 166 U. S. 226, 17 Supreme Court 580-587.

In *Minneapolis and St. Louis Railroad Company vs. Bombolis*, 241 U. S. 211, 36 Supreme Court 595, the Opinion of the Supreme Court delivered by Mr. Chief Justice White reads at p. 596:

"Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to

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what was necessary to constitute a verdict? Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox v. Ohio*, 5 How. 410, 434, 12 L. ed. 213, 223; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *Twining v. New Jersey*, 211 U. S. 78, 93, 53, L. ed. 97, 193. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 469, 552, 8 L. ed. 751, 781; *Supreme Justice v. Murray* (*Supreme Justice v. United States*) 9 Wall. 274, 19 L. ed. 658; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the author-

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ity of state and Federal courts and their mode of procedure from the beginning."

Finally, in the very recent case of *Brady vs. Southern Railway Company*, 320 U. S. 476; 64 Supreme Court 232, the matter seems to have been put at rest. This was an action to recover for the wrongful death of plaintiff's intestate and was under the Federal Employers' Liability Act. The plaintiff recovered a judgment in the trial court of the State of North Carolina; the Supreme Court of that State reversed the judgment for the plaintiff, which action of the State Court was affirmed by the United States Supreme Court. We quote the following from the Opinion by Mr. Justice Reed at p. 234:

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, *or by judgment notwithstanding the verdict*. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway v. United States*, 319 U. S. 372, 63 S. Ct. 1077," and other cases.

While four of the learned Justices dissented from the majority opinion, it is interesting to note that their dissent is based upon the effect of the evidence as establishing negligence rather than upon any irregularity in the procedure in the State Court.

We respectfully submit, therefore, that the 7th Amendment to the Constitution did not prevent the entry of judgment n. o. v. by the State Court in the case at bar.

The second reason urged for the granting of the writ is

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that the decision of the Supreme Court of Pennsylvania is in conflict with the decisions of the Supreme Court of the United States as expressed in *Bailey, Admr. vs. Central of Vermont*, 319 U. S. 350; *Pederson vs. D. L. & W. Ry. Co.*, 229 U. S. 146; *Tennant vs. Peoria and P. U. Ry. Company* 321 U. S. 29.

We will consider each of these cases in its order.

Bailey vs. Central Vermont Railway, 319 U. S. 350; 63 Sup. Court 1062;

This was an action under the Employers' Liability Act instituted in the State Court of Vermont to recover damages for the death of an employee of a railroad. The jury rendered a verdict for the plaintiff and on appeal the Supreme Court of Vermont reversed the decision, holding that a motion for a directed verdict should have been granted because no negligence was shown. The negligence alleged against the defendant was its failure to use reasonable care in furnishing Bailey with a safe place to work. The evidence presented in that case showed that Bailey met his death when he fell from a bridge about eighteen (18) feet above the ground. He was working on a cinder car on the bridge, his job being to open the hopper car so that cinders could be dumped through the ties in the bridge floor onto the railway below. The only available footing on the side of the car was about twelve (12) inches wide, of which eight (8) or nine (9) inches was taken up by a raised stringer; there was no guard rail. The hopper car could have been opened before it was moved onto the bridge. The court found that there was sufficient evidence to go to the jury on the question presented.

In the case at bar, there is neither allegation nor proof that the plaintiff did not have a safe place to work. He alleges three (3) grounds of negligence as follows:

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Insufficiency of tools and appliances with which to do the work; inadequate and unskilled help, and the negligence of the fellow employees in releasing their hold on the pipe.

The first of these is the failure to provide adequate equipment to do the work. He made out his case, if at all, by his own testimony. He admitted that the equipment consisted of two nose trucks, a one-wheeled dolly, a crow bar and rollers, all of which equipment was in the freight house on June 26, 1939, the date of the accident. The nose truck is a two-wheeled truck about five feet long with a piece of steel extending up on top of it about 8 inches, balanced on two wheels; it has two handles extending ten (10) or twelve (12) inches on each side; which are on the opposite end from the two wheels. In connection with this equipment it is important to know that Mr. Blair himself choose the nose truck because he considered it the best type of truck to use for handling the pipe. He did not attempt to prove any defect in the equipment. He stated that the dolly or nose truck, was not hard to push, and that all the men had to do was to push and steady the pipe onto the truck. With this same truck, Mr. Blair and his two assistants unloaded one piece of pipe; after the accident he continued to work and did not think he was seriously injured, and the three men proceeded with the same truck to reload the third piece of pipe, the second piece having slid onto the Mill truck at the time of the injury to Mr. Blair.

The second item of negligence was insufficiency of help in the unloading of the pipe. Mr. Blair was the only man working in the freight house, where he had been employed as a trucker for more than four years. He did not attempt to prove that it was necessary for more than two men to assist him in moving these pipes, nor that they were unable to do the job. In fact, Mr. Robert J. Miller and Mr. Dom-

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enick Fanno, the two assistants, who were called upon by Mr. Blair to help him, very successfully assisted in moving the first and the third piece of pipe. He did not produce any testimony to the effect that it was usual or customary to have more men on a job of this kind, nor in fact did he prove anything about these men except their ages. In the petition for certiorari, the petitioner refers to the one assistant as the "aging and infirm car inspector". Mr. Miller, the car inspector was sixty-three (63) years old at the time of the accident, and Mr. Fanno was fifty-seven (57) years of age. It has been said in a number of decisions that youth alone is not sufficient evidence of negligence: *Rickard vs. Stevens*, 133 Pa. 538; this should apply also to age.

In *Snodgrass vs. Carnegie Steel Company*, 173 Pa. 228, it is held that the plaintiff, in order to recover in an action for personal injuries where he claims his injury was caused by an incompetent fellow servant must show (1) that the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetence was known to the defendant when he was employed, by reason of the fellow servant having a reputation for incompetency, and that defendant had knowledge of the incompetence during the employment and before the accident. None of these elements appear in this case. Also, after this accident the plaintiff without protest to any one, or a request for any other help, loaded the third piece of pipe, which was of the exact size of the second, carried it on the same little truck across the warehouse floor, and unloaded it onto the Tube Mill truck. Nowhere in the Record do we read of any protest made to the men themselves, or to the station agent as to the equipment or the helpers, although he had been just injured as above indicated.

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In the case of *Lloyd vs. Norfolk and W. R. Railroad Company*, 151 Va. 409, 145 S. E. 372, it was held that where a track laborer had loaded seven (7) rails with the same assistants, this fact showed that the work could be accomplished with safety by the force then employed.

The third ground of alleged negligence was stated by the plaintiff, "the two men leaving go of it" (the truck). The plaintiff testified that an uneven place in the floor started the pipe to slip and that then the men let go of the nose truck, and the pipe slipped onto the warehouse floor. There was no allegation in the Statement of Claim, as to the condition of the floor. In its Charge to the jury, the court did not present to them any question as to the negligence of the defendant relative to the condition of the floor. There was no evidence to show any defect in the floor, with which the defendant could be charged, and this item was not before the jury when it brought in its verdict. Therefore, if the pipe began to slide because of an unevenness in the floor, an innocent cause, there could be no more negligence in the helpers' letting go of the handles in this sudden emergency than in the plaintiff attempting to hold onto his handle and suffering injury as a consequence thereof. If the accident occurred as stated by the helpers when called as defendant's witnesses, it occurred when they were about to push the pipe onto the Mill truck. Mr. Fanno, one of the helpers, stated that they gave it a push and that the hand truck hit the Mill truck, flew back and struck the plaintiff in the side. The trial Judge and the court en banc, had decided that the testimony of this witness "we give him push", might be some evidence of negligence. But the Supreme Court concluded that the only logical way to get the pipe onto the truck was to give it a push. There was no other way to load it. In order to make out negligence in this item, the plaintiff would be forced to show that the push was unusual or unnecessarily vio-

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lent. This testimony was brought out in defendant's case, and plaintiff did nothing to use it to his advantage. He did not even cross-examine Fanno as to how much of a push they gave it, whether it was an ordinary or extraordinary push; what part of the nose truck struck the Mill truck, or any other particulars. The reason for this is apparent, when we consider that the plaintiff had testified that the accident took place at the other end of the warehouse, and nowhere near the Mill truck. In his Charge to the Jury, on this phase of the case, the trial Judge said:

"The natural result of them doing that would have caused greased pipe to slide forward, which is exactly what they desired it to do, on to the bed of the automobile truck. The pipe did start to slide forward, as they intended, when they gave it a push. Naturally, as soon as one end of that pipe touched the floor, the weight of the pipe being towards the floor would cause the nose truck to do exactly what the witness said it did do, fly back and hit Mr. Blair."

If what happened was the natural and desired result, how could there be any negligence in bringing about that result.

The Bailey case says: "To deprive these workers of the benefit of a jury trial in *close or doubtful* cases, is to take away a good portion of the relief which Congress has afforded them".

We submit that the distinction between the Bailey case and our case is obvious and that not only is the case at bar not a close or doubtful case as to negligence, but it does not even present a scintilla of evidence much less come up to the requirements pronounced in the Brady case, 320 U. S., *supra*, to the effect that, "the weight of the evidence under the Employers' Liability Act must be more than a

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scintilla before the case may be presently left to the discretion of the triers of fact, in this case, the jury”.

In the case at bar, the plaintiff was given every opportunity of proving his case. He was represented by counsel who has had much experience in this type of case and knows the measure of proof necessary. If plaintiff did not produce evidence to sustain the allegations of negligence it must have been because such proof was not available, and, as a matter of fact, he has not to date intimated that he might have produced more evidence on the subject of the controversy. An examination of the Record will show that the plaintiff's counsel was not impeded or hampered in any manner by either the court or opposing counsel. In attempting to make out his case, plaintiff was his own witness, and the story he told as to the occurrence of the accident was exactly opposite to the story told by the defendant's witnesses. After verdict for the plaintiff the case was argued at length before the court en banc, and again after appeals by both parties it was argued before the Supreme Court of Pennsylvania and a decision handed down by that Court without dissent. We respectfully submit that the plaintiff has had his day in court and that there is nothing in this case to commend it to the Supreme Court of the United States.

We would respectfully call the Court's attention to the fact that Mr. Justice Roberts wrote a dissenting opinion in the Bailey case saying at p. 1064: "I am of opinion that this case is one of a type not intended by Congress to be brought to this Court for review." He then, in a very clear and convincing opinion, states his reasons for this view, and was joined in his opinion by Mr. Justice Frankfurter. Mr. Chief Justice Stone then added the following short but convincing opinion at p. 1066:

"I agree with Mr. Justice Roberts that the pres-

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ent case is not an appropriate one for the exercise of our discretionary power to afford a second appellate review of the state court judgment by writ of certiorari. But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided."

Pederson vs. D. L. & W. Ry. Company, 229 U. S. 146, 23 Sup. Ct. 648:

The main burden of the Pederson case was to establish that the plaintiff was employed in interstate commerce at the time of his injury. This case is cited by the petitioner for the proposition that the Federal Court cannot enter a judgment for defendant n. o. v. after a verdict for the plaintiff. We respectfully call the court's attention to the fact as shown in the first part of this Brief, that it was a State Court and not a Federal Court which entered the judgment in our case, and the Constitutional prohibition does not apply to the State Court.

Tennant vs. Peoria and P. U. Ry. Company, 341 U. S. 29; 64 Sup. Ct. 409:

This was an action under the Employers' Liability Act for recovery of damages for the death of plaintiff's intestate. The action was instituted in the Federal Court for the Southern District of Illinois, and the plaintiff recovered a verdict of \$26,250.00. On appeal the Circuit Court of Appeals reversed the judgment after finding that, while there was evidence of negligence by the respondent, there was no substantial evidence that this negligence was the proximate cause of Tennant's death. There was evidence that the Railroad Company had a written rule as well as the practice and custom of ringing the engine bell in the course of coupling operations. Tennant was a switchman in one of

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the yards. The engineer saw Tennant on the west side of the engine while waiting for the signal to backup and saw him walk toward the rear end of the engine and he was never seen alive after that. His duty was to stay ahead of the engine. The Supreme Court of the United States called attention to the legal proposition that there was a presumption in favor of Tennant, that he was in the performance of his duty and therefore, that he was back of the engine. He was apparently struck and killed by the backing engine, there being no eye witnesses to the occurrence. The question before the Court was whether the bell should have been ringing under the circumstances of the case. As stated by the Court, there was ample, though conflicting evidence, that the rule as well as practice and custom required the ringing of the bell in just such a situation. The ringing of the bell may well have saved his life. It is quite obvious that the question of proximate cause in the Tennant case was for the jury. If there was a custom and rule requiring the ringing of the bell, the employee might well have relied upon it.

Obviously there is no similarity whatever between the facts in the Tennant case and those in the case at bar. If the petitioner cited it as authority for the proposition that the Supreme Court might take jurisdiction of a case under the Employers' Liability Act after an adverse decision by an Appellate Court, with this we have no quarrel, but we fail to see how it can be authority and persuasive toward moving the Court to grant the writ in this case. Although in the Tennant case, the question of negligence seems very clear as stated in the majority opinion, yet Mr. Chief Justice Stone and Mr. Justice Roberts were of opinion that the judgment should have been affirmed rather than reversed.

The petitioner states five (5) questions to be present-

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ed, presumably if the certiorari be granted. These questions are as follows:

1. Alleged error of the Supreme Court of Pennsylvania in holding that there was no issue of fact for the jury relative to safe and sufficient tools and appliances.

We have heretofore shown that there was no evidence offered by the plaintiff to show any insufficiency or inadequacy in the tools and appliances which were furnished to him, and with which he chose to do the work.

2. Alleged error of the Supreme Court of Pennsylvania in holding that there was no issue of fact for the jury relative to sufficient and skillful fellow servants to perform the work.

This question has likewise been covered heretofore in this Brief, and we have shown that the plaintiff wholly failed to prove that the two men who assisted him were unskilled in the work, and that a larger force was necessary to perform the job safely, and also that the plaintiff admitted that he continued to work with the same two men after the accident and successfully loaded the third (3rd) piece of pipe with the same equipment and the same helpers.

3. Alleged error of the Supreme Court of Pennsylvania in holding that there was no issue of fact for the jury relative to the action of the two assistants when they "abandoned their hold on the load before exerting their utmost physical strength to avert the catastrophe."

We respectfully call the Court's attention to the fact that there is absolutely no evidence that these men did "abandon their hold on the load before exerting their utmost physical strength to avert the catastrophe".

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According to the Record the accident happened very quickly, and there was as much warrant for the handle slipping out of the hands of the assistants as there was for the plaintiff hanging onto his handle, as a result of which he was injured. There was no evidence offered by the plaintiff to show that these men acted in any manner which would impute negligence to them or the Railroad. What occurred was an unfortunate accident for which the Railroad should not be held liable.

4. Alleged error in the Supreme Court of Pennsylvania in re-examining the facts after they had been submitted to the jury.

This question has been covered in this Brief when we discussed the effect of the 7th Amendment to the Constitution of the United States, and the decisions of the Supreme Court, holding that this Amendment does not apply to courts of a State but only to courts of the United States.

5. Whether the Amendment to the Federal Employers' Liability Act of August 11, 1939, applies to this case which occurred June 26, 1939 and suit instituted June 18, 1941.

This question is here presented by the petitioner for the first time. In his argument before the Supreme Court of Pennsylvania, Brief for Appellant at No. 53 March Term, 1944, the attorney for the plaintiff practically conceded that the Amendment of 1939 was not retroactive. We quote the following from his Brief, pp. 7-8:

"At the time of this accident, June 26, 1939, the defense of assumption of risk was still available as a defense, although within two months thereafter by Act of August 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, Congress Amended the law abolishing 'every vestige' of assumed risk." * * * Assuming the Amendment is not

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retroactive, we conclude that assumed risk was open as a defense in the instant case with the burden of proof thereof upon Defendant to satisfy the jury, except in clear cases where fair minded men couldn't draw different inferences from the facts."

Doubtless he raises this question because the Supreme Court of Pennsylvania in its Opinion, 145a, stated that, "a risk of the employment was that the equilibrium of the pipe might be disturbed, but that was a risk which the workman assumed". The Court came to this conclusion after having decided that there was no evidence of negligence on the part of the railroad employees. The question of whether or not the Amendment abolishing the defense of assumption of risk was retroactive, was not before the court, and the observation just quoted is the only reference to anything of that character. We have not been able to find any decision of your Honorable Court ruling on this phase of the Amendment, but we respectfully call attention to the following decisions of other courts on the subject, and more particularly to the reasoning upon which their conclusions are based.

In *Painter v. Baltimore and Ohio R. Company*, 339 Pa. 271, 13 A. 2d 396, the Supreme Court of Pennsylvania decided that the amendment did not apply to the Painter Case, the accident having occurred prior to its enactment, stating in its Opinion as follows:

"It is argued that the purpose of this amendment was to bring all cases of injuries to railroad employees within the provisions of the Federal Act, whether or not such employees were engaged in interstate commerce, and further that the amending act is retro-spective, although not expressly so declared. To adopt this construction would violate the fundamental principle that a statute shall not be given retroactive effect

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unless such construction is required by explicit language or by necessary implication.' See *United States v. St. Louis, etc. Ry. Co.*, 270 U. S. 1, 3, 46 S. Ct. 182, 183, 70 L. Ed. 435."

In *Guerriero vs. Reading Co.*, 346 Pa. 187, 29 A. 2d 510, the Supreme Court of Pennsylvania decided that the amendment did not apply to that controversy because the accident had happened prior to its enactment, and further that it was a clear case of assumption of risk whether negligence had been shown or not, and that the trial court had acted properly in granting a non-suit and refusing to take it off. In that case, an experienced section laborer informed his foreman that more than the four men then available were needed to lift the motor truck on the rail, and the foreman told the men to raise the truck and did not promise him any additional assistants. Because he thought that it was too heavy to lift and nevertheless proceeded to do so, the court held that he had assumed the risk of over-exertion. He labored under no compulsion or any emergency. There was no testimony that he relied upon the foreman's judgment rather than upon his own. Under those circumstances he could not recover when injured as a result of lifting or assisting to lift the motor truck.

In *Lilly vs. Grand Trunk W. R. Co.*, 312 Ill. app. 73, 37 N. E. 2d 888, the Supreme Court of Illinois refused to give a retroactive effect to the assumption of Risk clause in the Amendment of 1939 for the reason that as stated by Justice Friend at p. 893:

"It seems clear to us that the existence of assumed risk as a defense to a suit at law is a vested right and not a remedy because it affects the liability of a railroad to an action upon which a money judgment may be predicated. The cases relied upon by plaintiff's counsel, as well as quotations from textbook writers,

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deal almost exclusively with remedies and not with vested rights. The right to a particular remedy may be taken away from litigants by the legislature through amendments which are retrospective, but the cases are uniformly to the effect that the legislature may not destroy a vested right by enactment of a law which operates retroactively. There is nothing in the amendment to the Federal Employers' Liability Act which would justify the assumption that congress intended to make it operative prior to August 11, 1939, the day on which it became effective.

In the case of *Christenson vs. Union Pacific Railroad Company*, 137 Neb. 538-290 N. W. 246, it was held that in an action for personal injuries sustained prior to the amendment, assumption of risk is a complete defense. Certiorari was granted by your Honorable Court (312 U. S. 673, 61 S. C. 733), but later dismissed (312 U. S. 710, 61 S. C. 825.)

We respectfully ask your Honorable Court to dismiss the petition for certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

CHARLES J. MARGIOTTI,

VINCENT M. CASEY,

MARGIOTTI, PUGLIESE & CASEY,

Attorneys for Respondent.